

**United States Department of Labor
Employees' Compensation Appeals Board**

J.H., Appellant)	
)	
and)	Docket No. 21-1162
)	Issued: June 6, 2023
DEPARTMENT OF HOMELAND SECURITY,)	
U.S. CUSTOMS & BORDER PROTECTION,)	
Charleston, SC, Employer)	
)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

ORDER REMANDING CASE

Before:
ALEC J. KOROMILAS, Chief Judge
JANICE B. ASKIN, Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 27, 2021 appellant filed a timely appeal from a June 4, 2021 merit decision of the Office of Workers' Compensation Programs (OWCP). The Clerk of the Appellate Boards assigned Docket No. 21-1162.

On March 10, 2021 appellant, then a 40-year-old customs and border patrol agent, filed a traumatic injury claim (Form CA-1) alleging that he was exposed to the COVID-19 virus while in the performance of duty. He explained that he experienced a continuous headache starting on January 30, 2021 and ran a low-grade fever on February 2, 2021. On February 3, 2021 appellant tested positive for COVID-19, and was told to quarantine by upper management. On the reverse side of the claim form, an employing establishment supervisor acknowledged that appellant was injured in the performance of duty. Appellant stopped work on February 3, 2021 and returned on February 16, 2021.

Accompanying the claim, appellant submitted a February 2, 2021 treatment note from a nurse practitioner who indicated that appellant "was swabbed for COVID-19 by rapid antigen testing, and the testing returned a POSITIVE result."

In a March 9, 2021¹ report, Dr. Cheryl Lynch, a pharmacist, noted that appellant was given a COVID-19 antibody test on March 9, 2021 with positive results.

OWCP received a copy of the February 2, 2021 report from the nurse practitioner and the March 9, 2021 report from pharmacist, Dr. Lynch.

On May 14, 2021 OWCP received a copy of a February 3, 2021 in-house laboratory report for an antigen test for appellant, which revealed a positive result.

By decision dated June 4, 2021, OWCP denied appellant's traumatic injury claim. It found that the medical evidence of record was insufficient to establish a diagnosis of COVID-19. OWCP concluded, therefore, that the requirements had not been met to establish an injury as defined by the Federal Employees' Compensation Act (FECA).²

The Board, having duly considered the matter, finds that this case is not in posture for decision.

An employee seeking benefits under FECA³ has the burden of proof to establish the essential elements of his or her claim, including that the individual is an employee of the United States within the meaning of FECA, that the claim was timely filed within the applicable time limitation of FECA,⁴ that an injury was sustained in the performance of duty as alleged, and that any disability or medical condition for which compensation is claimed is causally related to the employment injury.⁵ These are the essential elements of each and every compensation claim, regardless of whether the claim is predicated upon a traumatic injury or an occupational disease.⁶

Under section 4016 of the American Rescue Plan Act (ARPA) of 2021⁷ any claim made for COVID-19 by or on behalf of a "covered employee" for benefits under FECA will be deemed to have an injury proximately caused by exposure to COVID-19 arising out of the nature of the covered employee's employment. A "covered employee" is defined by ARPA as an employee under 5 U.S.C. § 8101(a) and employed in the federal service at any time during the period beginning on January 27, 2020 and ending on January 27, 2023. A "covered employee" prior to a diagnosis of COVID-19 must have carried out duties that required a physical interaction with at

¹ The report is dated March 3, 2019, however, this is a typographical error.

² 5 U.S.C. § 8101 *et seq.*

³ *Id.*

⁴ *See D.B.*, Docket No. 20-0797 (issued August 5, 2021); *F.H.*, Docket No. 18-0869 (issued January 29, 2020); *J.P.*, Docket No. 19-0129 (issued April 26, 2019); *Joe D. Cameron*, 41 ECAB 153 (1989).

⁵ *L.C.*, Docket No. 19-1301 (issued January 29, 2020); *J.H.*, Docket No. 18-1637 (issued January 29, 2020); *James E. Chadden, Sr.*, 40 ECAB 312 (1988).

⁶ *P.A.*, Docket No. 18-0559 (issued January 29, 2020); *K.M.*, Docket No. 15-1660 (issued September 16, 2016); *Delores C. Ellyett*, 41 ECAB 992 (1990).

⁷ Public Law 117-2 (March 11, 2021).

least one other person (a patient, member of the public, or a coworker); or was otherwise subject to a risk of exposure to COVID-19.⁸

Exposure to COVID-19 alone is not sufficient to establish a work-related medical condition. Manifestation of COVID-19 must occur within 21 days of the covered exposure.⁹ To establish a diagnosis of COVID-19, a claimant must submit the following: (1) a positive Polymerase Chain Reaction (PCR) or Antigen COVID-19 test result; or (2) a positive Antibody test result, together with contemporaneous medical evidence that the claimant had documented symptoms of and/or was treated for COVID-19 by a physician (a notice to quarantine is not sufficient if there was no evidence of illness); or (3) if no positive laboratory test is available, a COVID-19 diagnosis from a physician together with rationalized medical opinion supporting the diagnosis and an explanation as to why a positive test result is not available. Self-administered COVID-19 testing is insufficient to establish a diagnosis of COVID-19 under FECA unless the administration of the self-test is monitored by a medical professional and the results are verified through documentation submitted by such professional.¹⁰

Paragraph 2 of FECA Bulletin No. 21-10 provides, *inter alia*, “The FECA program will review all COVID-19 claims previously denied in accordance with the guidance provided in FECA Bulletin 21-09 based on the submission of an antigen test without contemporaneous medical to determine if the claim can now be accepted. This will occur without a request from the claimant. If the FECA program determines that the case can now be accepted under the ARPA, the case will be reopened under the Director’s own motion under Section 8128(a) of the FECA, and the case will be accepted. If this occurs, the claimant and employing agency will be notified.”

In light of the above-noted amendments, OWCP did not take into consideration all of the applicable criteria for establishing a diagnosis of COVID-19 when it denied appellant’s claim. This case shall therefore be remanded for consideration and application of FECA Bulletin Nos. 21-09, 21-10, and 22-06 with regard to appellant’s claim for COVID-19.¹¹ Following this and other such further development as deemed necessary, OWCP shall issue a *de novo* decision. Accordingly,

⁸ ARPA, *id.*; FECA Bulletin No. 21-09 (issued April 28, 2021).

⁹ FECA Bulletin No. 21-09 (issued April 28, 2021).

¹⁰ FECA Bulletin Nos. 21-09 (issued April 28, 2021), 21-10 (issued August 17, 2021), and 22-06 (issued February 16, 2022). FECA Bulletin No. 21-10 amended FECA Bulletin No. 21-09 in part to allow for a positive Antigen COVID-19 test result. FECA Bulletin No. 22-06 amended FECA Bulletin Nos. 21-09 and 21-10 to update COVID-19 claims processing guidelines relating to reinfection and home tests.

¹¹ See e.g., *Order Remanding Case, K.C.*, Docket No. 22-1066 (issued December 23, 2022), *Order Remanding Case, G.C.*, Docket No. 21-1016 (issued September 27, 2022) (the Board remanded these cases for proper application of FECA Bulletin No. 21-09).

IT IS HEREBY ORDERED THAT the June 4, 2021 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further proceedings consistent with this order of the Board.

Issued: June 6, 2023
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board